

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

KEVIN MICHON ANDERSON, et al.,)
Plaintiffs,)
vs.)
SHELBY COUNTY, et al.,)
Defendants.)
No. 03-2650 D/P

REPORT AND RECOMMENDATION

Before the court is defendants' Motion to Dismiss, filed October 5, 2005 (dkt #101). In the motion, defendants ask the court to enter an order dismissing from this case certain plaintiffs whose names were listed on the First Amended Complaint filed on March 17, 2004, but who have not made any effort to prosecute their claims. On October 17, 2005, the plaintiffs filed a response to the motion. For the reasons below, it is recommended that the defendants' motion to dismiss be GRANTED.¹

The original complaint was filed August 29, 2003, by plaintiff

¹On June 23, 2005, the District Judge entered an order referring all proceedings in this case, including trial, to the Magistrate Judge pursuant to the consent form executed by counsel for the named parties. Because this motion to dismiss pertains to plaintiffs who have not consented to trial by the Magistrate Judge, the court submits this report and recommendation to the District Judge.

Lynell Marcus Butler *pro se*. In the complaint, Butler alleged that he was incarcerated at the Shelby County Detention Center ("SCDC") during parts of 2002 and 2003, that he was repeatedly subjected to insect bites and spider bites, and that during the summer of 2002, medical care for these injuries was repeatedly delayed. Butler sued Shelby County and Correctional Medical Services, Inc. ("CMS") under 42 U.S.C. § 1983 for compensatory and punitive damages.² On March 15, 2004, Butler, who by this time was represented by attorney Paul Leitch, filed an Amended Motion for Leave to Amend Complaint. In this motion, Butler sought leave of court to add over fifty new plaintiffs who, like Butler, were currently or had been incarcerated at Shelby County detention centers in Memphis, Tennessee, and suffered injuries from spider bites. The amended complaint also sought to add a new defendant, Annie's Pest Control, Inc. The motion to amend was granted on March 16, 2004.

On March 18, 2004, the undersigned Magistrate Judge held a status conference with the parties. At that time, attorney Leitch asked the court for leave to withdraw as counsel in this case due to illness. At subsequent status conferences held on July 29 and August 5, 2004, the Magistrate Judge was informed that Randall Tolley, an attorney from the court's Civil Pro Bono Panel, had

²Other defendants, including SCDC Director George Little, Shelby County Sheriff Mark Lutrell, and other unknown individuals and entities, were dismissed from the complaint by the court on September 29, 2003.

agreed to represent the plaintiffs in this matter and to substitute as plaintiffs' counsel in place of attorney Leitch. The court granted Leitch's motion to withdraw as counsel.

Over the course of the next several months, the Magistrate Judge held numerous status conferences with the parties. During these conferences, attorney Tolley informed the court that he had been working diligently with former counsel for the plaintiffs to obtain the plaintiffs' case files, and to contact each plaintiff in order to execute the court's Civil Pro Bono Panel Contract of Representation form, which authorizes Tolley to represent the individual plaintiffs. Tolley regularly updated the court and defendants on his efforts to contact the plaintiffs, and requested additional time to locate the plaintiffs and secure signed contracts.³ Due to the number of plaintiffs, and with no opposition from the defendants, the court granted Tolley's requests for additional time.

On October 4, 2005, plaintiffs filed an amended complaint, which narrowed the list of plaintiffs to only those individuals who had signed contracts with Tolley. On January 30, 2006, plaintiffs filed another motion to amend the complaint to add plaintiff Rodrigues McKinney, who had recently signed a contract with Tolley. This motion was granted on March 8, 2006.

³For example, on September 6, 2005, Tolley filed a Notice of Unsigned Contract Plaintiff Status, which updated the court and defendants on his progress.

In the present motion to dismiss, defendants Shelby County and CMS seek dismissal of the claims with respect to all plaintiffs not identified in plaintiffs' most recent amended complaint. On March 23, 2006, the court held a conference on this case. At that conference, Tolley stated that he has taken all reasonable steps possible to locate all of the plaintiffs identified in the First Amended Complaint, and that other than those plaintiffs identified in his most recent amended complaint, he has not been able to secure signed contracts from any of the other plaintiffs. Moreover, Tolley informed the court that none of these other plaintiffs have contacted him to let him know that they intend to proceed *pro se* or to otherwise pursue this case. Finally, Tolley stated that he does not oppose the motion to dismiss.

The court submits that, pursuant to Fed. R. Civ. P. 41(b), the complaint with respect to the following plaintiffs who have not signed contracts with Tolley and who have not made any attempt to notify attorney Tolley, the defendants, or the court that they intend to proceed with the case, should be DISMISSED for failure to prosecute: Stacy Greer, John Hill, Bronson Clay, Mario Dewayne Bobo, Ray Burcham, Warren Ghan, James R. Jackson, Jevon Barnes, John Thomas Brooks, Calvin Ivory,⁴ Ray Kelley, Marvin Mathews,

⁴This name is spelled "Ivery" in the First Amended Complaint.

Courtney Nicholson, James Patterson, Byron Williams,⁵ Kevin White, Myron Arps, Marvin Jackson, Jeremy Garrot,⁶ Alonzo Johnson, Richard Martin, Willie Williams, Carl Smith, Tommy Jackson, Troy Jackson, Antonio Johnson, and Daniel Kevin Wright.

Respectfully Submitted.

S/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

July 17, 2006

Date

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND ANY FURTHER APPEAL.

⁵It appears that "Byron Williams" is the same individual listed as "Vyrone Dwyone Willaiams" in the First Amended Complaint.

⁶This name is spelled "Garrott" in the First Amended Complaint.